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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. [redacted] 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, H. K. Porter Company, Inc., Disston Division-Danville Works, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 22, 1969, enforcing a supplemental decision and order of the National Labor Relations Board.

OPINIONS BELOW

The clarifying opinion of the United States Court of Appeals for the District of Columbia Circuit which remanded this case to the National Labor Relations Board on December 8, 1967 (App. pp. 14-31)*, is reported at 389 F.2d 295 (D.C. Cir. 1967). The supplemental decision and order of the National Labor Relations Board, issued on remand on July 3, 1968 (App. pp. 31-38), are reported at 172 NLRB No. 72. The *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit enforcing the supplemental decision and order of the National Labor Relations Board (App. pp. 39-40) has not, as yet, been officially reported.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the District of Columbia Circuit, entered April 22, 1969 (App. pp. 39-40), is invoked under the provisions of 28 U.S.C. § 1254(1).

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*The abbreviation "App." refers to the appendix to this petition.

QUESTION PRESENTED

The question presented is whether under the National Labor Relations Act the National Labor Relations Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*), which are involved in this case are set forth in the Appendix, pp. 40-41. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the National Labor Relations Act are set forth immediately below.

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" (Emphasis added).

STATEMENT OF THE CASE

The judgment and decision, of which review by this Court is now sought, enforced, with one judge dissenting, a supplemental order of the National Labor Relations Board requiring the Petitioner to take the following affirmative action:

> "Grant to the Union a contract clause providing for the checkoff of union dues" (App. p. 36).

H. K. Porter Company, Inc., Disston Division-Danville Works (hereinafter referred to as the "Company" or "Petitioner") contends that the National Labor Relations Board (hereinafter referred to as the "Board") is absolutely devoid of the power to require the Company to grant such a contract clause.

This case initially arose from negotiations between the Company and the United Steelworkers of America, AFL-CIO (hereinafter referred to as the "Union") for a collective bargaining agreement (§ I JA 47-48)*. During these negotiations, the Union insisted that any labor contract between the parties must contain a provision for the collection of dues, and the Company refused to accede to this demand (§ I JA 47). The Union filed unfair labor practice charges (§ I JA 36-37), and, on July 9, 1965, the Board issued its original decision and order finding that the Company had violated Section 8(a)(5) of the National Labor Relations Act by failing to bargain in good faith on the issue of a contractual dues checkoff provision (§ I JA 58-59). The

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*The abbreviation "JA" refers to the joint appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

Board ordered the Company to bargain collectively with the Union (§ I JA 58-59).

On July 15, 1965, the Union filed in the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as the "Court of Appeals") a petition to review the Board's original decision and order. In its petition, the Union contended that the Board had erred in not ordering the Company to agree to a contract clause providing for dues checkoff (App. pp. 16-19). The Company also filed a petition to review the original order of the Board and the Board filed a cross-application for enforcement of its order. On May 19, 1966, the Court of Appeals enforced the Board's original order. 363 F.2d 272 (D.C. Cir.), *cert. denied* 385 U.S. 851 (1966).

The Company and the Union, in the ensuing contract negotiations, advocated divergent interpretations of the Board's original order as enforced by the Court of Appeals (App. pp. 17-18). The Union contended that the order of the Board, as enforced, required the Company to grant a contract clause providing for the checkoff of union dues (App. pp. 17-18). The Company contended that while the order required it to bargain in good faith over dues collection, the order did not compel the Company to agree to a dues checkoff provision (App. p. 17).

On February 28, 1967, the Union filed a motion for clarification of the Court of Appeals' order of May 19, 1966. In its motion, the Union requested the Court of Appeals to advise the parties that its order required the Company to agree to the Union's request for a contractual dues checkoff provision (App. pp. 17-18). On

March 22, 1967, the Union's motion was denied by the Court of Appeals on the grounds "that there is in the record no concession from the Company that the facts are as alleged by the Union, and that under the circumstances a contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the Company's compliance with the decree." (App. p. 18).

On April 3, 1967, the Union wrote to John A. Penello, Regional Director of Region 5, National Labor Relations Board, asking that a contempt action be initiated against the Company because the Company had not agreed to a dues checkoff provision in its collective bargaining agreement with the Union (App. p. 18).

On June 22, 1967, Regional Director Penello wrote to counsel for the parties as follows:

> "The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed" (App. p. 18).

After the Board thus had found the Company to be in compliance with its original order and had closed the case, the Union, on July 21, 1967, filed a motion asking the Court of Appeals to reconsider its denial of the Union's earlier motion for clarification. On December 8, 1967, the Court of Appeals (still, without any evidence on the record or admissions by the Company to support the allegations in the Union's motions) granted the Union's motion for clarification, is-

sued a further opinion "with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining", and remanded the case to the Board "for reconsideration in the light of this opinion" (App. p. 20).

On July 3, 1968 the Board issued its supplemental decision and order affirmatively requiring the Company to "Grant to the Union a contract clause providing for the checkoff of Union dues" (App. pp. 31-38).

The Company then filed a petition to review and set aside the supplemental order of the Board and the Board cross-petitioned for enforcement of its supplemental order. The Union intervened in these proceedings. As previously indicated, the Board's supplemental order was enforced by the Court of Appeals' order entered April 22, 1969 (App. pp. 39-40).

REASONS FOR GRANTING THE WRIT

Initially it should be emphasized that this case does *not* involve the question of whether a party can be ordered to execute a labor contract to which it has *previously agreed*. In this case, the Company has been expressly *ordered to agree* to a contract demand made by the Union during collective bargaining negotiations. Specifically, the Board has ordered the Company to:

> "Grant to the Union a contract clause providing for the checkoff of union dues" (App. p. 36).

The important point of this case is not whether this particular Union should or should not be granted a provision for dues checkoff at the Company's Danville Works, but whether the Board, as a remedy for violations of Section 8(a)(5) of the National Labor Relations Act, can so involve itself in the collective bargaining process as to compel unilateral concessions which could not be won at the bargaining table. While the Court of Appeals, as stated in its clarifying opinion in this case, believes that "the requirement that a checkoff be granted is at most minor intrusion on freedom of contract" (App. p. 27), if the Board can order Petitioner to agree to this contract clause, there is nothing to prevent it from ordering agreement with regard to wage rates, fringe benefits and other terms and conditions of collective bargaining agreements.

The Company contends that the Board does not have the power under the National Labor Relations Act to order a party to agree to *any* substantive provision of a collective bargaining agreement.

Reasons for Granting the Writ.

Section 8(d) of the National Labor Relations Act, in defining the obligation to bargain in good faith, provides in part:

> ". . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" (Emphasis added).

The Board, of course, is empowered by Section 10(c) of the Act to formulate orders to remedy the commission of unfair labor practices, but the Board's remedial orders certainly must not conflict with the policy of the Act and the intent of the Congress as expressed in the Act. Petitioner submits that the Board's supplemental order in this case is in violation of the policy of the National Labor Relations Act and the clear intention and mandate of the Congress as expressly set forth in Section 8(d) of the Act.

This Court has consistently recognized that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement. Even prior to the enactment of Section 8(d), this Court stated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937):

> "*The Act does not compel agreements between employers and employees.* It does not compel any agreement whatever. . . . The Theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (Emphasis added).

Similarly, this Court, subsequent to the enactment of Section 8(d), said in *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404 (1952):

> "And it is equally clear that the Board may not, either directly or indirectly, *compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" (Emphasis added).

The present remedial order of the Board represents the precise evil which Congress meant to obviate when it enacted Section 8(d). As Mr. Justice Brennan, reviewing the legislative history of Section 8(d), said in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 486-87 (1960):

> "Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. And in fact criticism of the Board's application of the 'good-faith' test arose from the belief that it was forcing employers to yield to union demands if they were to avoid a successful charge of unfair labor practice. *Thus, in 1947 in Congress the fear was expressed that the Board had 'gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make* and of the proposals and counterproposals that he may or may not make.' H. R. Rep. No. 245, 80th Cong., 1st Sess., P. 19. *Since the Board was not viewed*

by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8(d) of the Act. . . .

"The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended. . . . *But it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements.*" (Emphasis added).

Notwithstanding the contrary admonitions of this Court and the United States Congress, the Court of Appeals, in enforcing the supplemental order of the Board, has given the Board the power to control the settling of the terms of collective bargaining agreements.

The Board's supplemental order, as enforced by the Court of Appeals, is also in conflict with the pronouncements of many other circuits that the Board may not, directly or indirectly, compel a bargaining party to agree to a substantive term of a labor contract. *NLRB v. American Aggregate Co.*, 335 F.2d 253 (5th Cir. 1964); *NLRB v. Lewin-Mathes Co.*, 285 F.2d 329 (7th Cir. 1960); *NLRB v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955). In fact, the Board's present order is even in conflict with a prior decision of the same Court of Appeals which enforced the Board's supplemental order in this case. *Retail Clerks International Association v. NLRB*, 373 F.2d 655, 660 (D.C. Cir. 1967).

The Board, being an agency created by the Congress, cannot assume or exercise powers in excess of those given to it by the Congress. In this case, the Board, at the instance and with the sanction of the Court of Appeals, has assumed a power which the Congress not only failed to grant, but indeed expressly withheld.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492
UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, Respondent

No. 19,507
H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, Respondent
UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor

Motion for Reconsideration of Denial of Motion to Clarify Decree

Decided December 8, 1967

Messrs. Elliot Bredhoff, Michael H. Gottesman and George H. Cohen were on the motion for petitioner in No. 19,492 and intervenor in No. 19,507.

Messrs. Daniel W. Sixbey and *Bartholomew Diggins* were on the opposition for petitioner in No. 19,507.

Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, filed an appearance on behalf of respondent.

Before BAZELON, *Chief Judge,* WILBUR W. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge,* in Chambers.

WRIGHT, *Circuit Judge:* In October 1961 the United Steelworkers of America was certified as the bargaining representative of the production and maintenance employees of the H. K. Porter Company's Danville, Virginia, plant. A year later the union initiated an unfair labor practice proceeding alleging that the company was not making the good faith effort to reach an agreement which Sections 8(a) (5) and 8(d) of the National Labor Relations Act require. In an unreported decision the Trial Examiner, whose decision was adopted by the Board, found that the company had indeed failed to bargain in good faith by, among other things, adamantly refusing to agree to an arbitration provision while insisting on a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Examiner concluded that the company "was demanding in effect that the union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the company's actions were designed to "subvert the union's position as the statutory representative." No exceptions were taken to these findings, and in July 1964 the Fourth Circuit enforced the order of the Board that the company bargain in good faith.

In the meantime the company had refused to negotiate at all, pending the Trial Examiner's decision and its approval by the Board. In October 1963 bargaining resumed, with 14 issues in dispute. By November 1964, 21 more meetings had taken place, but still no final agreement was reached. During this period 11 issues were resolved; the union conceded 10, while the company, 10 months after the Trial Exam-

iner's decision requiring it to do so, finally withdrew its demand for a no-strike clause. Thus, when this second round of negotiations broke down, three issues remained unresolved: checkoff, wages and insurance.

The union had pressed for a checkoff at almost every bargaining session, but the company repeatedly refused to collect the dues of voluntarily paying members because dues collection was the "union's business" which the company would not foster or promote. On several occasions the union offered to withdraw its demand for a checkoff if the company would permit union stewards to collect dues during non-working hours in non-working areas of the plant. But the company rejected this alternative as well.

Again the union initiated unfair labor practice charges, and again the Trial Examiner, whose decision was again adopted by the Board, found that the company had violated its duty to bargain in good faith on the checkoff issue. He concluded, from substantial evidence in the record, that the real and only reason for refusing the checkoff was to "frustrate agreement with the union." At the hearing the company's representative admitted that it made deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company does check off union dues at certain of its other plants.

On May 19, 1966, this court affirmed the NLRB and granted the Board's cross-petition to enforce its order requiring the company to bargain in good faith. *United Steelworkers of America v. N.L.R.B., H. K. Porter Co. v. N.L.R.B.,* 124 U.S. App. D.C. 143, 363 F.2d 272, *cert. denied,* 385 U.S. 851 (1966). In our opinion we noted

an inconsistency in the Board's order. In a footnote, the Trial Examiner had said, "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled."

This conclusion conflicted with the Examiner's finding, in the text, that the company's refusal to grant a checkoff was solely "for the purpose of frustrating agreement with the union * * *." In our opinion enforcing the Board's order, we indicated that to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute. Since the text of the Trial Examiner's decision controls, we ruled that his Footnote 9 should be disregarded. We also invited the Board to initiate contempt proceedings if its order, as we interpreted it, was not complied with.

In the ensuing negotiations the company and the union each urged completely different interpretations of our decree. The company took the position that the decree was merely yet another order that it bargain in good faith — this time on the issue of dues collection. Accordingly, the company proposed to discuss the possibility of making available to the union a table in the payroll office. The union, on the other hand, asserted not only that it was entitled to its statutory

right to collect dues during non-working hours in non-working areas of the plant, but also that under our decision the company was obligated to agree to a contractual dues checkoff provision as well. In other words, the union interpreted the decree as entitling it to both channels of dues collection, while the company construed the decree as requiring it only to negotiate about giving the union some space to collect its own dues.

This disagreement apparently thwarted further bargaining, and on February 28, 1967, the union moved in this court for clarification of the decree. On March 22 we permitted filing of the motion and, on the same day, denied it. However, we again invited the Board to test the competing interpretations of the decree through it contempt process. On April 3 the union wrote to the Regional Director asking that he initiate contempt proceedings; on June 22 the Board responded by letter to this request as follows:

> "The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisios of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur."

Since the Board had apparently accepted the company's interpretation of the decree as requiring only that it now bargain with the union as to some form of dues collection, on July 21, 1967, the union filed a motion in this court that we reconsider our earlier denial of its

motion to clarify our decree. Permission to file is hereby granted, and to the extent of what follows, the motion to clarify is granted.

I

The Trial Examiner found that the company had no valid reason to refuse a checkoff provision and had done so solely to frustrate an agreement with the union. Though there was an inconsistency in his report, which report the Board adopted *in toto,* we resolved this contradiction by interpreting the Board's order as foreclosing the company from dreaming up new reasons for refusing a checkoff. By this we did not mean to say that the Board order required the company simply to agree to a checkoff provision. Though it would not be permitted to proffer new reasons for opposing such a clause, it was still free to seek something in return for granting it. Unless it did so, a presumption of continuing bad faith could not be dispelled.

We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations by agreeing simply to negotiate on alternatives to a checkoff. Apparently we misread the Board's order, for the Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations. Certainly the final responsibility for interpreting the Board's order must rest with the Board, for "the relation of remedy to policy is peculiarly a matter of administrative competence." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 194 (1941). And, indeed, it is only the Board that can initiate contempt proceedings even where its order has been enforced

by a judicial decree. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). Since the bargaining impasse may continue, however, some guidance from the court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order. This case will be remanded to the Board, therefore, for reconsideration in the light of this opinion.

II

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." The Labor-Management Relations Act extended the duty to bargain to unions, and, in Section 8(d), elucidated its meaning in some detail:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."[1]

The statute made explicit what the Board and the courts had already found by implication: that the duty

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[1] 61 STAT. 142 (1947), 29 U.S.C. § 158(d) (1964).

to bargain collectively required the employer to make a good faith effort to reach an accord with the union.[2] So far, on two separate occasions the H. K. Porter Company has been found not to have made such an effort. The company maintains, however, that all the Board can do, despite this tainted record, is issue yet another order that the company mend its ways and begin to bargain in good faith. The company argues that the last clause of Section 8(d)—"but such obligation does not compel either party to agree to a proposal or require the making of a concession"—bars the Board from taking more drastic action.

We do not read Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a)(5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position. In certain cases such action by the company may be the only means of assuring the Board, and the court, that it no longer harbors an illegal intent.

Section 8(d) defines collective bargaining and relates to the determination of *whether* a Section 8(b)(5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred. That is, Section 8(d) precludes

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[2]*See, e.g., N.L.R.B. v. Montgomery Ward & Co.*, 9 Cir., 133 F.2d 676 (1943); *see generally* Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1089 (1941); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

the Board from concluding that an employer had violated its duty to bargain in good faith simply because he did not agree to a particular proposal or make a particular concession. Where, as here, the subject of the dispute is a mandatory subject of bargaining,[3] either party may bargain to an impasse provided such bargaining is in good faith, and so long as the employer's position is maintained in good faith, no conclusive inference can be drawn from this obstinacy alone.

But in this case the Trial Examiner found bad faith. Based on the concatenation of circumstances taken as a whole, he concluded that the company's sole purpose in refusing a checkoff was to frustrate agreement with a union that had the statutory right to bargain collectively as the chosen representative of the employees of the plant. This was an unfair labor practice, for the right to refuse a particular proposal or to make a concession may not be used "as a cloak * * * to conceal a purposeful stategy to make bargaining futile or fail." *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 275 F.2d 229, 232 (1960). Since the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff.

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[3] *N.L.R.B. v. Darlington Veneer Co.*, 4 Cir., 236 F.2d 85 (1956); *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 205 F.2d 131, 136, *cert. denied*, 346 U.S. 887 (1953).

III

We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract —albeit collective contract.[4] The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board.[5] This ideal of freedom of contract is both a noble and a practical one,[6] and remedies which impinge on it are not to be casually undertaken. But an equally important policy of the Act is to equal-

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[4]As the Chairman of the Senate Committee on Education and Labor, Senator Welsh, put it in 1935: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

[5]The Board may not "sit in judgment upon the substantive terms of collective bargaining agreements," for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 404, 402 (1952). Nor can the Board "regulate the choice of economic weapons that may be used as part of collective bargaining"; if it could, "it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. * * * Our labor policy is not presently erected on a foundation of government control of the results of negotiations." *N.L.R.B. v. Insurance Agents Union*, 361 U.S. 477, 490 (1960). *See generally* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA.L. REV. 467, 469-477 (1964).

[6]*See* Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-630 (1943).

ize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives,[7] and the major purpose behind the Section 8(a) 5 duty to bargain is to make meaningful this fundamental right of employees.[8] As the Senate

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[7]Congress stated the theory of the Act in its first section: "The inequality of bargaining power between employees * * * and employers * * * tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners * * *." To restore equality of bargaining power it was declared to be a policy of the United States to encourage "the practice and procedure of collective bargaining." 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

[8]As the Supreme Court said in reviewing the legislative history of the Wagner Act: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement." *N.L.R.B. v Insurance Agents Union, supra* Note 5, 361 U.S. at 483. Professor Wellington has termed this the "supportive" function of the duty to bargain. "In the absence of a requirement of good faith negotiation, collective bargaining may never occur. * * * The statutory scheme of protecting organization from unfair practices and of allowing employee choice between union and no-union in such a situation would be frustrated." Wellington, *supra* Note 5. 112 U. PA. L. REV. at 470. As Professor Cox has put it: "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating pyschological blow to have the employer shut the office door in the union's face. Imposing a legal duty to recognize the union would prevent such anti-union tactics and thereby contribute to the growth of strong labor organizations." Cox, *supra* Note 2, 71 HARV. L. REV. at 1408.

Committee report accompanying the National Labor Relations Act put it:

> "* * * It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as have been designated * * * and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. * * * * " S.Rep No. 573, 74th Cong., 1st Sess., p. 12 (1935).

To make sure that this primary right is fulfilled, the NLRB has been given broad remedial powers. Section 10 (c) of the Act charges the Board with the task "of devising remedies to effectuate the policies of the Act." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)[9] Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a checkoff

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[9]Section 10(c), 29 U.S.C. § 160(c), authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively.

This court is cognizant of the fact that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way.[10] As Dr. Ross concluded in his landmark study of duty to bargain cases:

> "7. The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act." Ross, *Analysis of Administrative Process Under Taft-Hartley,* 63 LAB. REL. REP. 132, 133 (BNA 1966).[11]

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[10]The H. K. Porter Company has also been found to have committed unfair labor practices in connection with union election campaigns. *H. K. Porter, Inc. and United Textile Workers of America,* 131 N.L.R.B. 1383 (1961).

[11]A special subcommittee on labor of the House Committee on Education and Labor is now considering proposed legislation, H.R. 11725, 90th Cong., 1st Sess., designed to make the National Labor Relations Act remedies more effective. And the Board itself is engaged in a study of whether it should more rigorously exercise its existing remedial powers by awarding compensatory pay for delays caused by illegal refusals to bargain. The Trial Examiner in *Zinke's Foods, Inc.,* NLRB Case No. 30-CA-372, proposed such a remedy, while another Examiner recommended against it in *Herman Wilson Lumber Co.,* NLRB Case No.26-CA-2536. *See also Ex-Cell-O Corp.,* NLRB Case No. 25-CA-2377, and *Int. U., United Automobile, etc. Workers of America v. N.L.R.B.,* Nos. 20,137, 20,185 and 20,301 (*appeals pending*) where the

When the unfair labor practices are committed in localities where hostility to the union movement may run deep, the determined employer who litigates charges often succeeds in ousting the union despite the Board's repeated findings of Section 8(a) (5) violations.[12] And the testimony of witnesses at the recently completed hearings of the House subcommittee on NLRB remedies shows that the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate.[13]

The requirement that a checkoff be granted is at most a minor intrusion on freedom of contract. In a case such as this, the checkoff provision—a provision which is included in 92 per cent of all manufacturing in-

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Board, after denying such a remedy, has asked that the cases be remanded for reconsideration of this question. As the Board said in *H. W. Elson Bottling* Co., 155 N.L.R.B. 714, 715 (1965): "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred * * * ." "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations.'" *Id.* at 715 n.5.

[12]"The collective bargaining consequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions." Ross, *supra*, 63 LAB. REL. REP. at 133.

[13]Testimony before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 11725 (1967).

dustries labor contracts[14]—is likely to be of life or death import to the fledgling union,[15] while it is of no consequence whatever to the employer.[16] Yet if the Board can do no more than repeatedly order the company to bargain in good faith, the workers' rights to bargain collectively may be nullified. The Board is empowered to see that this does not happen. Where an employer has twice been found to have violated his duty to bargain in good faith, a checkoff in return for a reason-

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[14] *See* BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, p. 87:3. Most of the contracts not containing a checkoff provide for some alternative method of dues collection on company property. *Id.* at p. 87:901.

[15] In the instant case, the nearest union office was in Roanoke, Virginia, 85 miles from the plant. The employees were scattered over a wide area. As we said in our original opinion, collection of dues without a checkoff would have presented the union with a substantial problem of communication and transportation.

[16] "The check-off is of great consequence to the union, as it avoids the necessity of collecting dues each and every week. It is of small consequence to the employer, especially if the union agrees to bear the additional expenses." *Supplemental statement of Frank Thompson, Jr., Chairman, Special Subcommittee on Labor,* September 14, 1966, HEARING BEFORE THE SPECIAL SUBCOMMITTEE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, 89 Cong., 2d Sess., p. 77 (1966). In fact, the Subcommittee recommended that the simple refusal to agree to a checkoff paid for by the union should itself be recognized "as a criteria of bad faith bargaining" and "an indication of anti-union animus." *Ibid.* In the instant case the company admitted that it had no business reason for opposing the checkoff.

able concession by the union[17] may be the only effective remedy. Such a remedy "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board,* 319 U.S. 533, 540." *Fibreboard Paper Products Corp. v. N.L.R.B.,* 379 U.S. 203, 216 (1964).

Remanded

Senior Circuit Judge WILBUR K. MILLER dissents.

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[17]The Board has not undertaken to oversee the reasonableness of the substantive terms of collective bargaining contracts. Nor has it found a breach of the duty to bargain by considering simply the reasonableness of the offers and counteroffers made by the parties. This is as it should be. But as Judge Magruder pointed out: "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *N.L.R.B. v. Reed & Prince Mfg. Co., supra* Note 3, 205 F.2d at 134. The Board could make a comparable judgment in deciding whether *its remedial order that reasonable counter offers be made* has been complied with.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,492
SEPTEMBER TERM, 1967

United Steelworkers of America, Petitioner,
v.
National Labor Relations Board, Respondent.

NO. 19,507

H. K. Porter Company, Inc., Petitioner,
v.
National Labor Relations Board, Respondent.

Before: BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge and WRIGHT, Circuit Judge in Chambers.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Filed Dec. 8, 1967

NATHAN J. PAULSON
Clerk

Order

On consideration of the motion of United Steelworkers of America, AFL-CIO, for leave to file its lodged motion for reconsideration, it is

ORDERED by the Court that the Clerk is directed to file the lodged motion for reconsideration, the opposition thereto, and the motion requesting oral argument, and on consideration whereof, it is

FURTHER ORDERED by the Court that to the extent of the Court's opinion issued this date the motion to clarify is granted, and this case is remanded to the Board for reconsideration in light of the opinion.

Per Curiam.

Senior Circuit Judge Wilbur K. Miller dissents.

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172 NLRB No. 72

D-983
Danville, Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVILLE WORKS
and
UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Case 5-CA-2785

SUPPLEMENTAL DECISION AND ORDER

On July 9, 1965, the National Labor Relations Board issued its Decision and Order in this case[1] finding that the Respondent had violated Section 8(a)(5) of the National Labor Relations Act, as amended, by failing to bargain in good faith with the Union on the issue of a checkoff provision in the collective-bargaining agreement with the Union. The Board thereupon ordered the Respondent to bargain collectively. On May 19, 1966, the United States Court of Appeals for the District of Columbia enforced the Board's Order.[2] Pursuant to a motion by the Union, the Court, on December 8, 1967, issued a decision clarifying its earlier decree and remanding the proceeding to the Board.[3]

The Board in the original decision herein concluded that the real and only reason for refusing the checkoff was to "frustrate agreement with the union" and ordered the Respondent to bargain with the Union. In enforcing that order the Court stated that it was "not necessary to include a specific reference to checkoff in the Board's order."[4] The Court also indicated that in any contempt proceeding instituted in the case it would be able to make a judgment based on the Respondent's performance at the bargaining table.

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[1] 153 NLRB 1370.

[2] *United Steelworkers of America v. N.L.R.B.*; *H. K. Porter Co. v. N.L.R.B.*, 363 F.2d 272 (C. A. D.C.), cert. denied 385 U.S. 851.

[3] 389 F. 2d 295 (C. A. D.C.).

[4] 363 F. 2d 272 at 276.

In subsequent contract negotiations the parties each urged divergent interpretations of the Court's decree. Briefly stated, the Union interpreted the decree as obligating the Company to agree to a contractual dues-checkoff provision, while the Company construed the decree as requiring it only to discuss the possibility of giving a checkoff or some form thereof and therefore its offer to give the Union space in the payroll office to collect its dues fulfilled its obligation. Thereafter, the Regional Director for Region 5 indicated to the Union that the Respondent had satisfactorily complied with the decree and the Board declined to institute contempt proceedings.

In its decision granting the Union's motion to reconsider an earlier denial of a motion to clarify its enforcement decree, the Court noted the parties' divergent interpretations of the Order, and the subsequent bargaining impasse which had arisen therefrom. It believed, therefore, that "some guidance from the Court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order."[5]

The Court noted that on two separate occasion the Respondent had been found to have violated Section 8(a)(5) by not making a good-faith effort to reach agreement with the Union.[6] The Court indicated that "the workers' rights to bargain collectively may be nullified" when a company repeatedly flouts its bargaining obligation, if the Board does no more "than repeatedly

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[5]289 F.2d 295 at 298.

[6]The instant case and an earlier unreported Trial Examiner's Decision in Case 5-CA-2344.

order the company to bargain in good faith." The Court thereupon held that in such circumstances the Board may order the company to make "meaningful and reasonable counteroffers, or indeed even to make a concession." Pointing out that the Respondent had conceded that it had no business reason for refusing to grant a checkoff, the Court stated that "it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union" on one of the remaining issues. And "it is possible," added the Court, "that in an appropriate case the Board could simply order the company to grant a checkoff . . . ."

The Court recognized that the Act is grounded on the premise of freedom of contract. However, it also pointed out that Section 8(a)(5) intends to make meaningful the fundamental duty of the employer to bargain with the representative of the employees. When these two concepts are in conflict, the Court further stated, "the Board must seek to devise remedies which will best effectuate the one at least cost to the other."

As Respondent has repeatedly violated Section 8(a)(5) and admittedly had no business reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude in accordance with the Court's rationale, that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed

by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consumation of a collective-bargaining agreement. Accordingly, we shall vacate our initial order in this case and shall direct that Respondent grant a checkoff provision to the Union.

Supplemental Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in said Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action found necessary to effectuate the policies of said Act:

(a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.

(b) Grant to the Union a contract clause providing for the checkoff of union dues.

(c) Post at its plant in Danville, Virginia, copies of the notice attached marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. July 3, 1968.

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
GERALD A. BROWN, Member
SAM ZAGORIA, Member
[SEAL] NATIONAL LABOR RELATIONS BOARD

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[7]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO A
DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL, upon request, bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in a unit composed of all production and maintenance employees at our Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors, as defined in the National Labor Relations Act, with respect to rates of pay and other terms and conditions of employment, and if an understanding is reached, embody the same into a signed agreement.

WE WILL grant to the Union a contract clause providing for the checkoff of union dues.

WE WILL NOT by refusing to bargain collectively with the duly designated representative of our employees, or in any like or related manner, interfere with, restrain, or coerce our employees, in the exercise of their right to self-organization, to form, join, or assist the above-named, or any other labor organization of our employees, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of mutual aid, or to refrain from any or all such activities.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above named or any other labor organization.

H. K. PORTER COMPANY, INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 1019, Federal Building, Charles Center, Baltimore, Maryland 21201 (Tel. No. 962-2822), if they have any question concerning this notice or compliance with its provision.

Appendix to Petition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,222
SEPTEMBER TERM, 1968

H. K. Porter Company, Inc.,
Disston Division—Danville Works, Petitioner
v.
National Labor Relations Board, Respondent
United Steelworkers of America, AFL-CIO,
Intervenor

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Filed April 22, 1969

NATHAN J. PAULSON
Clerk

Petition to review and set aside and cross-petition to enforce an order of the National Labor Relations Board.

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT, *Circuit Judge*.

Order

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside and a cross-petition to enforce an order of the National Labor Relations Board, and was argued by counsel.

This case has been before this court on two prior occasions. *See United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 124 U.S.App.D.C. 143, 363 F. 2d 272,

cert. denied, 385 U.S. 851 (1966); *United Steelworkers of America, AFL-CIO v. N.L.R.B.,* 128 U.S. App. D.C. 344, 389 F. 2d 295 (1967). For the reasons stated in those opinions, as well as in the Board's supplemental decision and order dated July 3, 1968, which is attached as an appendix to this order, it is

ORDERED by the court that the petition for review of the supplemental decision and order of the Board dated July 3, 1968, be, and the same is hereby, denied, and the Board's order is hereby enforced.

Per Curiam.

Senior Circuit Judge WILBUR K. MILLER dissents.

Appendix to Petition.

Excerpts From National Labor Relations Act.

The following portions of the National Labor Relations Act are involved in this case:

Section 8(a)

"It shall be an unfair labor practice for an employer —

* * *

"(5) to refuse to bargain collectively with the representatives of his employees . . . ."

Section 8(d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Section 10(c)

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . ."
